Supreme Court, U.S.
FILED
JAN 15 1992
OFFICE OF THE CLERK

No. 91-1167

In The

Supreme Court of the United States

October Term, 1991

SKY CHEFS, INC.,
a Delaware corporation,

Petitioner,

v.

CONNIE DIAS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

WALTER V. SIEBERT
(Counsel of Record)
ELIZABETH I. KIOVSKY
JAMES E. HAUTZINGER
SHERMAN & HOWARD
3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does the application of a procedural rule, which rule was not established at the time the objection was made, regarding the timeliness of an objection, impermissibly thwart consideration of a party's constitutional claim?

2. Do equal protection principles prohibit a party from exercising peremptory challenges on the basis of a venireperson's gender?

3. Does a civil defendant have standing to assert a violation of the rights of discriminatorily excluded jurors to equal protection of the laws?

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No. _____

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SKY CHEFS, INC.,
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v.

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To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sky Chefs, Inc. ("Petitioner" or "Sky Chefs") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered on October 29, 1991.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on November 29, 1990, is reported at 919 F.2d 1370, and

appears in Appendix A. Judgment was entered in the United States District Court for the District of Oregon on June 23, 1989 following the denial of the post-trial motions of Sky Chefs and appears in Appendix A. Sky Chefs filed a Petition for a Writ of Certiorari with this Court on January 16, 1991. This Court Granted Sky Chefs Petition on June 6, 1991, reversed the judgment of the Ninth Circuit and remanded the case for further consideration. This Court's Judgment appears in Appendix A. The Ninth Circuit's Judgment and Opinion on remand was entered on October 29, 1991, is reported at ___ F.2d ___ (9th Cir. 1991), and appears in Appendix A.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on October 29,1991.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sky Chefs has standing to assert the defenses set forth in this Petition pursuant to Article III of the United States Constitution, which states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their

> Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

Sky Chefs asserts a violation of the fifth amendment to the United States Constitution which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

The right to equal protection of the laws expressed in the fourteenth amendment is applicable to Sky Chefs by virtue of the due process clause of the fifth amendment. The fourteenth amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Respondent, Connie Dias ("Respondent" or "Dias"), was employed as a clerical worker in the Portland, Oregon facility of Petitioner,[1] from April 1985 until her termination on December 7, 1987. During the final months of her employment by Sky Chefs, Dias' supervisor was Tony Nathalia ("Nathalia"), the General Manager of the Portland facility. Dias brought this action against Petitioner in the United States District Court for the District of Oregon. Dias alleged three state law claims against Sky Chefs[2] including intentional infliction of severe emotional distress; wrongful discharge for protesting the sexual

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[1] Respondent was the Plaintiff-appellee in the lower court proceedings and Sky Chefs was the Defendant-appellant.

[2] The district court had jurisdiction over this case by virtue of the diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332. The Ninth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1291.

harassment of others; and violation of ORS 659.410 (discrimination against employees applying for workers' compensation benefits). *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370 (9th Cir. 1990), *vacated*, 111 S.Ct. 2791, *on remand*, ___ F.2d ___ (9th Cir. 1991).

The case was tried to a jury composed of six women on June 13 through 16, 1989. The jury venire consisted of fourteen jurors, three men and eleven women. Respondent used her peremptory challenges to strike all of the men from the jury panel. Petitioner timely objected to Respondent's peremptory challenges on the ground that Respondent had systematically excluded individuals from the jury based on their gender. Petitioner objected prior to the start of the trial, but after the jury was sworn. Under the circumstances, Petitioner's objection occurred at the earliest possible time and Respondent was not prejudiced by the timing of the objection. At the time of trial (June 1989), the right of a party to object to the discriminatory use of peremptory challenges in a civil action between private parties had not been recognized by any federal court. Nor had a federal court permitted an objection to the discriminatory use of peremptory challenges on the basis of gender. Despite Petitioner's objection, the district court made no inquiries of Dias and proceeded with the trial.

The jury returned a verdict for Dias on her claims of intentional infliction of severe emotional distress and wrongful discharge. It awarded her $125,000 in general damages and $500,000 in punitive damages. The jury found for Sky Chefs on Dias' statutory workers' compensation discrimination claim.

The district court entered judgment on June 13, 1989, and denied Sky Chefs' post-trial motions on September 21, 1989. Sky Chefs timely filed its appeal with the United States Court of Appeals for the Ninth Circuit on October 5, 1989. The Ninth Circuit affirmed the district court's judgment on November 27, 1990. Petitioner timely filed a Petition for a Writ of Certiorari with this Court on January 16,1991. On June 10, 1991, this Court granted Sky Chefs Petition, vacated the Judgment of the Ninth Circuit and remanded the case for reconsideration in light of *Edmonson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 111 S.Ct. 2077 (1991). The Ninth Circuit again affirmed the District Court's judgment on October 29, 1991.

The Ninth Circuit did not address Sky Chefs' claim that its right to equal protection under the fifth amendment was violated by the Respondent's use of peremptory challenges to strike all males from the jury venire, leaving an all-women jury. The Court, instead, affirmed the judgment against Sky Chefs solely on the grounds that Sky Chefs' objection to the composition of the jury was neither timely nor proper. ___ F.2d at ___.

REASONS FOR GRANTING THE WRIT

A. This Case Presents Exceptionally Important Questions of Federal Law Which Have Far Reaching Consequences for Civil Litigation.

This case involves the discriminatory use of gender based peremptory challenges in civil litigation. Currently, a direct conflict exists among the Circuit Courts of Appeal as to whether the principles announced in *Batson*

v. Kentucky, 476 U.S. 79 (1986), are applicable to gender based peremptory challenges.[3] Sup. Ct. R. 10.1(a). This case also raises the propriety of application of a newly created procedural rule to deprive Petitioner and the excluded jurors of their constitutional right to equal protection of the law. The existence of a conflict among the Circuit Courts of Appeal on whether gender based peremptory challenges violate equal protection, coupled with the extreme importance of resolving this issue dictate that a Writ of Certiorari should issue.

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[3] *United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988) (*Batson* does not apply to gender based peremptory challenges); *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990), *reh'g en banc granted*, 930 F.2d 695 (1991) (*Batson* does apply to gender based peremptory challenges). State courts are also sharply split regarding the application of *Batson* to gender based peremptory challenges. *Compare, Fisher v. Alabama*, 587 So. 2d 1039 (Ala. 1991), *petition for cert. filed*, (December 12, 1991). (*Batson* does not apply to gender based peremptory challenges); *State v. Oliviera*, 534 A.2d. 867 (R.I. 1987) (same); *Hannan v. Commonwealth*, 774 S.W.2d. 462 (Ky.App. 1989) (same) *with State v. Levinson*, 795 P.2d 845, 849 (Hawaii 1990) (equal protection clause of state constitution prohibits use of gender based peremptory challenges); *People v. Irizarry*, 560 N.Y.S.2d 279 (N.Y. App. 1990) (federal and state constitution prohibit gender based peremptory challenges); *Di Donato v. Santini*, 232 Cal. App. 3d. 721, 283 Cal. Rptr. 751 (Cal. Dist. Ct. App. 1991) (*Batson* prohibits the use of gender based peremptory challenges.); *State v. Gonzales*, 111 N.M. 590, 808 P.2d 40 (N.M. App.), *cert. denied*, 1991 N.M. LEXIS 46 (1991). (State Constitution prohibits use of gender based peremptory challenges).

B. Summary of Argument.

The courts below erred in denying Sky Chefs' objection to Dias' use of her peremptory challenges to strike all of the males from the jury panel. The district court's failure to conduct an evidentiary hearing addressing Dias' motives for her use of peremptory challenges after Sky Chefs made a *prima facie* showing of discrimination, violated Sky Chefs' right to equal protection of the laws guaranteed by the due process clause of the fifth amendment of the United States Constitution.[4] U.S. CONST. amend. V. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that the equal protection clause of the fourteenth amendment forbids a prosecutor in a criminal case from exercising peremptory challenges against potential jurors solely on account of the juror's race or on the assumption that black jurors as a group will be unable to impartially consider the state's case against a black defendant. *Batson*, 476 U.S. at 90.

In *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364 (1991), the principles adopted in *Batson* were expanded to allow a white defendant in a criminal case to raise the equal protection claims of black jurors excluded by the prosecution because of their race. 111 S.Ct. at 1373. The objecting party's race "is irrelevant to a defendant's standing to

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[4] This case involves a federal defendant and thus, Sky Chefs' equal protection claim is based on the due process clause of the fifth amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954). The right to the equal protection of the laws expressed in the fourteenth amendment has been found by implication in the due process clause of the fifth amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

object to the discriminatory use of peremptory challenges." *Powers*, 111 S.Ct. at 1373. As the Court made clear in *Powers*, an opposing litigant has standing to raise the excluded jurors' rights on his or her behalf. *Id.* This Court again visited the issue of the discriminatory use of peremptory challenges in *Edmonson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 111 S.Ct. 2077 (1991), and held that the discriminatory use of peremptory challenges by a defendant in a civil action is so dominated by governmental authority that such discrimination is subject to constitutional restraints.

Refusing to address the constitutional issue, the Ninth Circuit held that Sky Chefs' objection was untimely because it was raised after the jury was sworn. This holding conflicts with law of the Ninth Circuit allowing an objection to the discriminatory use of peremptory challenges after the jury was sworn but before the trial began. *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). The Ninth Circuit thus created a new rule regarding the timeliness of a *Batson* objection and retroactively applied that rule to Petitioner. The objection, in addition, was improper, according to the Ninth Circuit, because it did not request that the trial court take any action. To the contrary, Sky Chefs' objection satisfied each of the elements necessary to establish a *prima facie* case of discrimination, effectively shifting the burden to Respondent to justify her use of the peremptory challenges. Based on these principles, Sky Chefs was deprived of its constitutional right to equal protection by the discriminatory use of peremptory challenges by Dias which were allowed over Sky Chefs' objection.

C. Sky Chefs' Objection was Timely and Proper.

1. Sky Chefs' Objection was Timely.

The Ninth Circuit, on remand from this Court, without receiving further briefing or argument from the parties, refused to address Sky Chefs' right to raise the equal protection rights of excluded jurors; instead the Ninth Circuit held that Sky Chefs failed to object to Respondent's discriminatory use of peremptory challenges in a timely manner. This ruling is inconsistent with federal law of the Ninth Circuit on which the Ninth Circuit relied, creates a new procedural rule applied retroactively to Sky Chefs and deprives both Sky Chefs and the excluded jurors of their constitutional right to equal protection under the laws. *Dias v. Sky Chefs*, ___ F.2d. at ___.[5]

According to the Ninth Circuit, the objection was untimely because it was raised after the jury was sworn, in violation of law of the Circuit holding that, "*Batson* objections must occur as soon as possible, preferably before the jury is sworn. *See United States v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987)." *Dias*, ___ F.2d at ___. This

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[5] When the Ninth Circuit was first called upon to address Sky Chefs' challenge to the discriminatory use of peremptory challenges by Respondent, it relegated the issue of the timing of the objection to a footnote. *Dias v. Sky Chefs*, 919 F.2d at 1380, n.6. The Ninth Circuit instead held that as a corporation, Sky Chefs was not a member of the constitutionally protected class allegedly excluded from the jury, males, and therefore had no right to challenge the exclusion of a class of which it was not a member, (a position that *Powers* specifically rejects) and that Sky Chefs did not have standing to raise the equal protection rights of excluded jurors (a position that *Powers* and *Edmonson* specifically reject).

very language from *Thompson*, quoted by the Ninth Circuit in this case, reveals that the law of the Circuit did not set forth an inflexible rule that an objection to the discriminatory use of peremptory challenges be raised before the jury is sworn. Only by ignoring both the facts and the holding of *Thompson*, was the Ninth Circuit able to establish a new "rule" in the Circuit requiring a *Batson* objection be made prior to the swearing of the jury.

In *Thompson*, the defendant in a criminal case objected to the exclusion of blacks from the jury only on sixth amendment grounds. *Thompson*, 827 F.2d at 1257. Further, the defendant did not raise its objection *until after the jury was sworn*. Id. The Ninth Circuit held, however, that the objection was both proper and timely:

> Because the law was in a state of flux at the time of trial, and because the prosecution has shown no prejudice, we conclude that Thompson may raise his equal protection claim on this appeal . . . . The government also argues that Thompson's objection came too late because he did not raise it until just after the jury was sworn. We are unpersuaded. The pattern of the prosecution's peremptory challenges might not have been apparent until the jury was selected, so the objection could not in any case, have been raised much earlier. While it may have been the better practice to raise the objection just after the jury was selected but before it was sworn, the government suffered no prejudice from the delay.

Id. at 1257. In this action, the Ninth Circuit applied the language in *Thompson* that, "While it may have been the better practice to raise the objection just after the jury was

selected but before the jury was sworn," as a settled rule that the objection *must* be raised before the jury is sworn. *Dias*, ___ F.2d at ___. No conceivable reading of *Thompson* supports the existence of such a blanket rule. *Thompson*, to the contrary, looked to the facts of the case to determine whether the objection raised after the jury was sworn was prejudicial to the government and thus untimely.

The Ninth Circuit refused to give Sky Chefs the same consideration it gave Thompson despite the striking similarities between the two cases. The Ninth Circuit compared the facts in *Thompson* to the present case as follows,

> Although in *Thompson* we permitted such an objection because the defendant raised it at the first opportunity and no prejudice was shown, here it could have been raised much earlier and prejudice did result from the delay. For example, the objection could have been raised when Sky Chefs' attorney first saw the list of challenged jurors, when the challenged jurors were asked to move to the back of the courtroom, as soon as the jury was sworn in, or immediately before the judge declared the recess.

Id. at ___. Dias was prejudiced by this delay, according to the Court, because if the objection had been raised earlier, the district court could have given Dias an opportunity to respond and could have excluded the juror if the explanation was unsatisfactory. *Id.*

The Ninth Circuit provides absolutely no explanation as to why the discriminatory use of peremptory challenges on the basis of race in *Thompson* "might not have been apparent until after the jury was selected,"

Thompson, 827 F.2d at 1257, but that Sky Chefs could and should have raised the objection much earlier. At the time the *Thompson* case was tried, *Batson* had not been decided by this Court. Likewise, at the time of trial of this case, *Powers* and *Edmonson* had not been decided by this Court, nor had any appellate court allowed an objection to the use of peremptory challenges based on the venireperson's gender.

The Ninth Circuit in *Thompson*, moreover, found no prejudice to the government arose from the timing of the *Batson* objection, but held without providing a discernible distinction, that Dias was prejudiced by the timing of Sky Chefs' objection. In both cases, the objecting parties' remedy would have been the same – to declare a mistrial and to empanel a new venire. When compared to the potential deprivation of the objecting party's constitutional interests, the prejudice to Dias from empaneling a new venire, like the prejudice to the government in *Thompson*, is virtually non-existent.

The rule applied to Sky Chefs to bar consideration of its constitutional claim is nothing short of a totally new "rule". It is simply an after-the-fact creation by the Ninth Circuit, contrary to its own previous decision, intended to serve only one purpose – to thwart consideration of this party's viable constitutional claim. The rule was neither firmly established, nor regularly applied to litigants in the Ninth Circuit and cannot be adopted after the fact to preclude consideration of Petitioner's equal protection claim.

This Court recently addressed an analogous situation in *Ford v. Georgia*, ___ U.S. ___, 111 S.Ct. 850 (1991). In that

case, the Supreme Court considered whether a rule of procedure laid down by the Georgia Supreme Court regarding the time at which a *Batson* claim must be raised to be timely, was an adequate and independent state procedural ground barring review of the petitioner's *Batson* claim. In *Ford v. Georgia*, 255 Ga. 81, 335 S.E.2d (1987), the Georgia Supreme Court applied the state procedural rule allegedly set forth by that court in *State v. Sparks*, 257 Ga. 97, 355 S.E.2d 658 (1987), to bar petitioner's *Batson* claim, thereby avoiding the constitutional issue. According to the Georgia Court, the rule adopted in *State v. Sparks*, 257 Ga. 97, 355 S.E.2d 658 (1987), established that a *Batson* claim must "be raised prior to the time the jurors selected to try the case are sworn." 111 S.Ct. at 854 *quoting State v. Sparks*, 257 Ga. at 98, 355 S.E.2d at 659. In *Sparks*, the defendant had objected to the discriminatory selection of the jury *after* the jury was sworn. The Georgia Supreme Court in *Sparks* considered the claim as having been raised relatively promptly. Subsequently, in *Ford v. Georgia*, however, the Georgia Supreme Court barred Ford's claim where the objection was also made after the jury was sworn, holding that the objection was untimely.

This Court rejected the *Sparks* rule as a procedural bar to petitioner's equal protection claim because the rule was not firmly established at the time in question. As a general rule, it is appropriate to look to local rules for the law governing the timeliness of a constitutional claim, including a *Batson* claim. *Ford*, 111 S.Ct. at 857. This general rule is, however, subject to limitation to the extent that,

> Novelty in procedural requirements cannot be permitted to thwart review in this Court applied

> for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Id. at 857 *quoting NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958). Only a "firmly established and regularly followed state practice" may be interposed by a court to prevent review of a constitutional claim. *Id.* at 857 *quoting James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830 (1984).

The Georgia Supreme Court's application of the state procedural rule, allegedly adopted by the Georgia Court in *Sparks*, did "not even remotely satisfy the requirement of *James* that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied." *Id.* at 857-858 *quoting James v. Kentucky*, 466 U.S. 341, 348-51 (1984). This Court, therefore, reversed and remanded the case for further proceedings.

The state procedural rule, adopted by the Georgia Supreme Court in *Sparks*, erroneously applied to the defendant in *Ford* is strikingly similar to the claimed *Thompson* procedural rule applied by the Ninth Circuit to preclude review of Sky Chefs' *Batson* objection in this case. In both cases, an unsettled procedural rule was applied in a different manner so as to inappropriately thwart a viable constitutional claim. The defendant in *Sparks*, like the defendant in *Thompson*, was allowed to raise a *Batson* objection after the jury was sworn. Like the procedural rule applied by the state court in *Ford*, the alleged *Thompson* rule applied by the Ninth Circuit to Petitioner in this case was neither firmly established nor

regularly followed at the time in question. Accordingly, the alleged *Thompson* rule cannot thwart judicial review of Sky Chefs' equal protection claim.[6]

2. Sky Chefs' Objection was Proper.

The Ninth Circuit also rejected Petitioner's objection to the discriminatory use of peremptory challenges on the ground that no proper objection was made. *Dias v. Sky Chefs*, ___ F.2d at ___. At the time of the trial in this matter, an objection to the use of peremptory challenges had not been recognized in a civil action nor had such an objection been recognized in relation to the venirepersons' gender. Under the circumstances, Sky Chefs' objection was entirely adequate. The objection fulfilled each of the elements necessary to establish a *prima facie* case of

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[6] Other federal courts have recognized that objections to the use of peremptory challenges may be timely raised at various points prior to the start of trial. *See, e.g., Reynolds v. City of Little Rock*, 893 F.2d 1004, 1008 (8th Cir. 1990) (Objection raised as an observation after the jury was sworn was timely); *U.S. v. Dobynes*, 905 F.2d 1192, 1196 (8th Cir.), *cert. denied*, 111 S.Ct. 206 (1990) (objection is one that allows the court to remedy discrimination prior to the commencement of trial, objection raised one week after jury returned its verdict was untimely); *U.S. v. Allen*, 666 F. Supp. 847, 856 (E.D. Va. 1987), *aff'd*, 847 F.2d 138 (4th Cir.), *cert. denied*, 488 U.S. 944 (1988) (objection raised after jury selected and retired to the jury room was timely.) Only the Fifth Circuit has adopted a clear rule regarding the timing of a *Batson* objection. In the Fifth Circuit, to be timely a *Batson* objection must be made before the venire is dismissed and before the trial commences. *U.S. v. Romero-Reyna*, 867 F.2d 834 (5th Cir. 1989).

discrimination thus shifting the burden to Respondent to justify her use of the peremptory challenges.

Sky Chefs' attorney objected as follows:

> The other thing is Your Honor, just for the record we would object to the jury as it has been impaneled. We think there has been a systematic exclusion of males from the jury and that is evidenced by the list that went back and forth and we ask that that be preserved for the record and made a part of the record in this action.
>
> The Plaintiff – there were three males that were originally in the jury panel. Only three males. They were all struck by the plaintiff. We think that this is no different than the cases that the courts have ruled on before where blacks have been systematically excluded from jury panels.
>
> This is a female sex harassment case and we are deprived of the benefit of a proper jury that represents a cross section of society here. Again that's for the record Your Honor.

Dias, ___ F.2d at ___.

Batson and its progeny have established the standards for assessing a *prima facie* case in the context of discriminatory selection of the venire. Sky Chefs' objection satisfies these standards. *Batson* held that to establish a *prima facie* case, "the defendant first must show that he is a member of a cognizable racial group." *Batson*, 476 U.S. at 96. *Powers* held that the defendant's membership in the group excluded is not a precondition to establishing a *prima facie* equal protection violation. A criminal defendant has standing to raise the equal protection rights of jurors excluded in violation of equal protection

principles. *Powers*, 111 S.Ct. at 1373. A civil defendant likewise has standing to raise the equal protection rights of the excluded jurors. *Edmonson*, 111 S.Ct. 2088. Accordingly, Sky Chefs' objection that, "there has been a systematic exclusion of males from the jury. . . . there were three males that were originally in the jury panel. Only three males. They were all struck by the plaintiff . . . " satisfies the requirement that the objecting party show that a member of a cognizable group has been excluded from the jury.

Second, the defendant must show that the opponent has exercised peremptory challenges to remove members of a protected group from the venire. *See Batson*, 476 U.S. at 98. Sky Chefs satisfied this requirement by its objection that, "there were three males that were originally in the jury panel. Only three males. They were all struck by the Plaintiff. . . . This is a female sex harassment case and we are deprived the benefit of a proper jury . . . " *See, e.g., U.S. v. Clemons*, 843 F.2d 741,748 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988) (prosecutor's use of peremptory challenges to exclude the only two black members of the jury panel established *prima facie* case of discrimination); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988) (Whenever government strikes all members of defendant's race, *Batson* requires the prosecutor to explain his reasons).

Finally, the objecting party must show that the facts and other relevant circumstances raise an inference of discrimination in violation of the equal protection clause. In assessing the existence of a *prima facie* case, relevant factors trial judges consider include how many members of the cognizable group (in this case males) are in the

panel; the nature of the case, and the race of the accuser and of the accused. *See U.S v. Clemons*, 843 F.2d at 748. Here, all the males in the venire were struck by the female plaintiff in a case alleging claims based on sexual harassment. This is certainly the type of case in which "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who have a mind to discriminate' ". *Batson*, 476 U.S. at 96 *quoting in part Avery v. Georgia*, 345 U.S. at 562.

Establishment of a *prima facie* case of discrimination in the opponent's use of peremptory challenges, triggers the trial court's obligation to require the plaintiff to state on the record the reasons for the strikes. *See, e.g., Batson*, 476 U.S. at 97; *United States v. Ferguson*, 935 F.2d 862, 864 (7th Cir. 1991); *U.S. v. Clemons*, 843 F.2d 741, 745 (3d Cir. 1988). "Once the defendant makes a *prima facie* showing, the burden shifts to the [Plaintiff] to come forward with a neutral explanation" for the challenges. *Batson*, 476 U.S. at 98. This the district court did not require of Dias. Contrary to the Ninth Circuit's holding, Sky Chefs did everything required of it to shift the burden to the Plaintiff to articulate a neutral explanation for her challenges.

The Ninth Circuit's emphasis on the statement by Sky Chef's counsel that the objection was "for the Record." does not require a different result. In a similar context, the Second Circuit held in *United States v. Rudas*, 905 F.2d 38, 39-40 (2d Cir. 1990), that the defense counsel's statement, "Judge, for the record I would like to raise at this time that out of the 6 peremptory challenges the government used 2 to excuse 2 out of 3 Hispanic surnamed persons in this panel," was sufficient to shift the burden to the prosecutor to articulate neutral reasons

for the challenges. In *U.S. v. Davis*, 809 F.2d 1194, 1199 (6th Cir.), *cert. denied*, 483 U.S. 1007 (1987) the objection that it was, "fairly obvious that the Government [was] making a concerted attempt to exclude any members of the black race from this jury panel" was sufficient to require a neutral explanation from the prosecutor.

Sky Chefs adequately notified the Court and the Plaintiff of the basis for its objection. The trial courts' decision to ignore this objection does not render the objection improper. Sky Chefs' objection was therefore both timely and proper requiring reversal of the Ninth Circuit's judgment.

D. Equal Protection Principles Prohibit Peremptory Challenges Exercised on the Basis of a Venireperson's Gender.

The principles established in *Batson*, *Powers*, and *Edmonson* prohibit the exercise of peremptory challenges on the basis of the venireperson's gender. The Constitution treats gender classifications differently than racial classifications, but both are subject to heightened levels of judicial scrutiny. Racial classifications are considered "suspect classifications." Accordingly, a race based classification must fail unless it is narrowly tailored to serve a compelling state interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985) (discussing the different levels of constitutional scrutiny to which different classifications are subjected).

A party seeking to uphold a classification of individuals on the basis of their gender must carry the heavy

burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). To withstand constitutional challenge, classifications by gender must serve important governmental objectives and the discriminatory means employed must be substantially related to achieve those objectives. *Craig v. Boren*, 429 U.S. 190, 199 (1976), *reh'g denied*, 429 U.S. 1124 (1977); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980).

As this Court held in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 (1982), the standard of scrutiny under the equal protection clause is not altered or reduced simply because the state action discriminates against males rather than against females. *See also, Orr v. Orr*, 440 U.S. 268, 279 (1979).

No "exceedingly persuasive justification" for allowing gender based peremptory challenges exists. This Court has established that the Constitution does not confer a right to peremptory challenges. *Batson*, 476 U.S. at 91. Although peremptory challenges are a necessary means for achieving the important governmental objective of impaneling a fair and impartial jury, *see Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990), *reh'g denied*, 110 S.Ct. 1514 (1990); *Swain v. Alabama*, 380 U.S. 202, 211-12 (1965), *overruled in part on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986); *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting), "peremptory challenges constitute a jury selection practice that permit 'those to discriminate who

are of a mind to discriminate.' " *Batson*, 476 U.S. at 98 *quoting Avery v. Georgia*, 345 U.S. 559, 562 (1953).[7]

Gender based peremptory challenges are not related to any important governmental objective. In *United States v. De Gross*, 913 F.2d 1417, *reh'g. en banc granted*, 930 F.2d 695 (9th Cir. 1991), the Ninth Circuit upheld the district court's denial of a criminal defendant's peremptory challenge of a male venireperson. 913 F.2d at 1423.[8] Challenges explained by a venireperson's gender, like racial challenges, are based either on the false assumption that members of a certain group are unqualified to serve as jurors, or on the false assumption that members of certain groups are unable impartially to consider the case against a member or a non-member of their group. *Id.* at 1422.

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[7] The sixth amendment "entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs." *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803, 805 (1990). This Court established in *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975), that exclusion of women from the jury pool violates the sixth amendment. Gender discrimination in the selection of a jury for a specific trial violates these same prohibitions. A state "may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.' " *Powers*, 111 S.Ct. at 1369 quoting in part *Batson*, 476 U.S. at 88.

[8] Numerous state courts, relying on state and federal constitutional guarantees of equal protection, have similarly prohibited the use of gender based peremptory challenges. *See, e.g., State v. Levinson*, 795 P.2d 845 (Hawaii 1990); *People v. Irizarry*, 560 N.Y.S.2d. 279 (App. Div. 1990); *State v. Gonzales*, 111 N.M. 590, 808 P.2d 40 (N.M. App. 1991), *cert. denied*, 1991 N.M. LEXIS 46 (1991).

"Peremptory challenges exercised on the basis of a venireperson's gender, therefore, are not substantially related to achieving an impartial jury." *Id.*

Gender based peremptory challenges also fail to relate to governmental interests of engendering public confidence in the judicial system. Gender based discrimination in the jury selection process harms not only the litigants, but the exclusion of individuals from a jury on the basis of their gender is incongruous with traditional notions of the jury as a representative body "composed of the peers or equals of the person whose rights it is selected or summoned to determine." *Batson*, 476 U.S. at 86 *quoting Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). As the Ninth Circuit concluded in *De Gross*, "Because gender discrimination during jury selection is not substantially related to the achievement of an important governmental interest, the fifth amendment's equal protection principles compel us to prohibit peremptory challenges on the basis of gender." *Id.*[9]

Sky Chefs established a *prima facie* case of gender based discrimination in Respondent's use of her peremptory challenges.[10] At trial, Dias testified to the alleged sexual harassment suffered by women working under the Portland District Manager, Nathalia. Dias also called to testify numerous former female employees of Petitioner to testify to the sexual harassment those women suffered while working under Nathalia. In fact, nearly all of Dias'

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[9] The Fourth Circuit appears to have reached a contrary conclusion. *See United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988), *cert. denied*, 110 S.Ct. 1109 (1990).

[10] *See* Discussion at Section C.2., *supra*.

claims were based on allegations of sexual harassment. Anticipating this, Dias struck all three males from the jury venire resulting in an all female jury. These circumstances certainly "raise the inference that a strike has been made for the purpose of ridding the venire of the accused peers." However, even after Petitioner's objection, the trial judge failed to require Dias to state nondiscriminatory reasons for striking all males from the jury thereby denying Petitioner it constitutional right.

E. Sky Chefs Has Standing to Object to Dias' Use of Peremptory-Challenges to Exclude Males from the Jury Panel.

Sky Chefs has standing to raise the equal protection rights of potential jurors excluded on the basis of their gender. This Court has repeatedly made clear that race-based peremptory challenges violate the equal protection rights of those excluded from jury service. *Powers*, 111 S.Ct. at 1370; *Carter v. Jury Commissioner of Greene County*, 396 U.S. 320 (1970); *Batson*, 476 U.S. at 87. Equally clear is the defendant's right to raise the excluded jurors equal protection rights. *Powers*, 111 S.Ct. at 1373; *Edmonson*, 111 S.Ct. at 2087. As this Court noted in *Powers*, "[I]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers*, 111 S.Ct. at 1370. There exist, however, limited exceptions to the limitations on judicial authority.

> [A] litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with

> the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests.

Edmonson, 111 S.Ct. at 2087. As the *Edmonson* Court held, "All three of these requirements for third-party standing were held satisfied in the criminal context, and they are satisfied in the civil context as well." *Id.* As the foregoing discussion reveals, the same requirements for third-party standing are applicable when the equal protection challenge is based on the venireperson's gender.

Sky Chefs satisfies the three requirements for third-party standing as set forth in *Powers* and *Edmonson*. Petitioner has suffered a cognizable injury and has a concrete interest in challenging Respondent's discriminatory use of peremptory challenges. In *Powers*, the injury to and interest of a criminal defendant in challenging a prosecutor's discriminatory use of peremptory challenges arose because, "discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process' . . . and places the fairness of a criminal proceeding in doubt." *Powers*, 111 S.Ct. at 1371 *quoting Rose v. Mitchell*, 443 U.S. 545, 556 (1979). In the civil context, this Court held in *Edmonson*,

> The harms we recognized in *Powers* are not limited to the criminal sphere. A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the

> courtroom, whether the proceeding is civil or criminal.

Edmonson, 111 S.Ct. at 2088.

Second, Sky Chefs has a close relation to the third party – the excluded jurors. In this context, "the relation between Petitioner and the excluded jurors is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases." *Powers*, 111 S. Ct. at 1372. Jurors and litigants often establish a bond in the jury selection phase that lasts throughout the trial. The excluded juror and the objecting litigant have a common interest in excluding discrimination from the courtroom. *Powers*, 111 S.Ct. at 1372. The relation between the excluded jurors and the civil litigant challenging the exclusion are as close in a civil as in a criminal trial. *Edmonson*, 111 S.Ct. at 1372.

Finally, substantial barriers exist to the ability of excluded jurors to raise their own equal protection claims. Jurors are severely limited in their ability to protect their own rights and, as a practical matter, it is difficult and, accordingly rare, for excluded jurors to personally challenge their discriminatory exclusion. *Powers*, 111 S.Ct. at 1373. The barriers to a juror in a civil action are no less daunting. *Edmonson*, 111 S.Ct. at 2087.

In this case, an exception thus exists to the general rule that a party is precluded from resting a claim on the legal rights or interests of third parties. Sky Chefs therefore has standing to raise the equal protection rights of the excluded jurors.

CONCLUSION

The principles of *Batson v. Kentucky* should be extended to prohibit gender based peremptory challenges in a civil case. Sky Chefs has third party standing to raise the discriminatory exclusion of males from the jury by Dias in violation of the fifth amendment.

For these reasons, Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

WALTER V. SIEBERT
ELIZABETH I. KIOVSKY
JAMES E. HAUTZINGER
SHERMAN & HOWARD
3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

APPENDIX

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38a	Judgment of United States District Court for the District of Oregon

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONNIE DIAS, *Plaintiff-Appellee,* v. SKY CHEFS, INC., *Defendant-Appellant.*	No. 89-35778 D.C. No. CV-88-367-FR OPINION

On remand from the United States Supreme Court

Filed October 29, 1991

Before: Betty B. Fletcher, Warren J. Ferguson and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Jury

On remand from the Supreme Court, the court of appeals affirmed its previous judgment. The court held that it need not decide whether peremptory challenges striking male jurors from the venire, leaving an all-woman jury, violated defendant's constitutional right under *Edmonson* because defendant failed to make a timely and proper objection to the jury selection process.

The Ninth Circuit had previously upheld a jury verdict finding appellant Sky Chefs, Inc., liable for the

actions of its general manager, who sexually harassed women employess and wrongfully discharged another for resisting that harassment. The Supreme Court vacated that judgment and remanded for reconsideration in light of *Edmonson*. Appellant maintained that under that Supreme Court decision his fifth amendment rights were violated by plaintiff's use of peremptory challenges to strike three males from the jury venire, leaving an all-woman jury. The court was only required to consider that part of its opinion dealing with the jury selection issue only.

The court did not need to consider whether *Edmonson* permitted Sky Chefs to assert the rights of the allegedly excluded male jurors, because Sky Chefs' objection to Dias' peremptory challenges was untimely. In addition, Dias would be prejudiced if the court entertained Sky Chefs' tardy objection on appeal. At no time did Sky Chefs' counsel request the court to require Dias to articulate a gender-neutral explanation for the peremptory strikes. Because the trial court was not asked to do anything Sky Chefs could not expect relief from the appellate court.

COUNSEL

Walter V. Siebert, Sherman & Howard, Denver, Colorado, for the defendant-appellant.

Richard C. Busse, Portland, Oregon, for the plaintiff-appellee.

OPINION

FERGUSON, Circuit Judge:

I.

Supreme Court has remanded this case for reconsideration in light of the Court's subsequent opinion in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

When the case was previously before us, we affirmed a jury verdict on all grounds presented on appeal. The jury found Sky Chefs, a corporation, liable for the actions of its general manager, who sexually harassed women employees and wrongfully discharged a woman employee, Ms. Connie Dias, for resisting that harassment. *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370 (9th Cir. 1990). The Supreme Court granted certiorari, vacated our decision, and remanded the case for reconsideration. *Sky Chefs, Inc. v. Dias*, 111 S. Ct. 2791 (1991).

II.

An issue in this case is Sky Chefs' assertion, relying on *Batson v. Kentucky*, 476 U.S. 79 (1986), that its Fifth Amendment rights were violated by Dias' use of peremptory challenges to strike three males from the jury venire, leaving an all-woman jury. For the reasons set forth in our previous opinion, we rejected that argument and upheld the peremptory challenges. *Dias*, 919 F.2d at 1377-80.

In *Edmonson*, the Supreme Court extended the *Batson* rule and held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on the basis

of their race. The Court found that race-based exclusion violates the equal protection rights of the challenged jurors. 111 S. Ct. at 2080.

In this case, Sky Chefs asserts that Dias used peremptory challenges to remove venirepersons because they were men. The Supreme Court's mandate requires us to consider whether the alleged gender-based exclusion of men falls within the rules announced in *Edmonson*. However, upon review of the record and reconsideration, we find that we need not decide this issue because Sky Chefs failed to make a timely and proper objection to the jury selection process.

III.

The Supreme Court did not require this court to reconsider any part of its opinion other than the jury selection issue, and we therefore affirm without modification all of the opinion with the exception of Part V. We vacate all of Part V and substitute the following:

Finally, Sky Chefs asserts that its Fifth Amendment rights were violated by the plaintiff's use of peremptory challenges to strike three males from the jury venire, leaving an all-woman jury.[1] We review this issue of law *de novo*, *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984). Although Sky Chefs relied only on *Batson v. Kentucky*, 476 U.S. 79 (1986), which dealt with race-based challenges in criminal cases, we note that a panel of this court has

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[1] The transcript indicates that five women were also struck from the jury by peremptory challenges.

recently extended the *Batson* equal protection right to gender-based peremptory challenges. *United States v. De Gross*, 913 F.2d 1417, 1421-23 (9th Cir. 1990), *reh'g en banc granted*, 930 F.2d 695 (1991).[2]

In a different context, the Supreme Court has recently extended *Batson* to civil cases, holding that racially biased peremptory challenges violate the equal protection rights of excluded jurors. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). It also held that a civil litigant may have standing to assert those rights, based on a three-part test: the litigant has suffered a concrete injury, he or she has a close relationship with the jurors, and the excluded jurors are *de facto* barred from asserting their own rights. *Id.* at 2087-88.[3]

We need not consider here whether *Edmonson* permits Sky Chefs to assert the rights of the allegedly excluded male jurors, because Sky Chefs' objection to Dias' peremptory challenges was untimely. We have stated that *Batson* objections must occur as soon as possible, preferably before the jury is sworn. *See United States v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987).

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[2] Although *DeGross* was decided on September 10, 1990, after briefing in *Dias* had already been completed, we apply the decision retroactively unless "inequitably results" would follow. *Reed v. Hoy*, 909 F.2d 324, 327 (9th Cir. 1989). We assume without deciding that both *DeGross* and *Edmonson* apply retroactively. However, we note that *DeGross* itself affords no new rights to civil litigants or corporations such as Sky Chefs.

[3] These factors are very similar to those we applied in *De Gross*, although in that case it was the government who objected to the peremptory challenge. *De Gross*, 913 F.2d at 1421-21.

Here, the objection was raised only after the excluded jurors had been dismissed, the jury had been sworn, the court had recessed and reconvened, defendant's motions in limine had been presented and argued, and defendant had noted several other objections. Sky Chefs did not ask the judge to conduct a *Batson* hearing on the issue of discriminatory intent, but merely stated as follows:

> MR. SIEBERT: The other thing is, Your Honor, just for the record we would object to the jury as it has been impaneled. We think there has been a systematic exclusion of males from the jury and that is evidenced by the list that went back and forth[4] and we ask that that be preserved for the record and made a part of the record in this action.

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[4] The district court used the "Arizona system" of jury selection. Instead of announcing publicly the name of the juror selected for a peremptory challenge, attorneys' exercise peremptory challenges as follows.

When the panelists have been accepted after challenges for cause, the courtroom deputy presents a list of the names to plaintiff's counsel. The list contains two columns, one marked Plaintiff and the other Defendant. Plaintiff's counsel may mark a peremptory challenge in the appropriate column. The deputy then gives the list to defendant's counsel to mark a peremptory challenge. The list is passed back and forth until both sides have exhausted or passed peremptory challenges. The judge announces the names of the panelists who have been challenged, and asks them to sit in the back of the courtroom. The courtroom deputy then seats six jurors and any alternates from the list who have not been challenged, and the jury is empaneled.

The gender of the dismissed panelists is immediately apparent to both counsel.

> The Plaintiff – there were three males that were originally in the jury panel. Only three males. They were all struck by the plaintiff. We think that this is no different than the cases that the courts have ruled on before where blacks have been systematically excluded from jury panels.
>
> This is a female sex harassment case and we are deprived of the benefit of a proper jury that represents a cross section of society here. Again, that's for the record, Your Honor.
>
> THE COURT: All right. Just mark that then and it will become an exhibit not to go to the jury.
>
> The Clerk advises me that it's always made part of the record anyway. It is part of the record.
>
> All right. You may bring the jury back in, please.

Although in *Thompson* we permitted such an objection because the defendant raised it at the first opportunity and no prejudice was shown, here it could have been raised much earlier and prejudice did result from the delay. For example, the objection could have been raised when Sky Chefs' attorney first saw the list of challenged jurors, when the challenged jurors were asked to move to the back of the room, as soon as the jury was sworn in, or immediately before the judge declared the recess.

Furthermore, Dias would be prejudiced if we entertained Sky Chefs' tardy objection on appeal. Had Sky Chefs objected contemporaneously with the voir dire, the

court could have given Dias an opportunity to respond and could then have ruled on the *Batson* objection after she presented her explanation. If her explanation was not satisfactory, the court could then have denied her exercise of the peremptory, as was done in *DeGross*, 913 F.2d 1419, 1419. If the explanation was satisfactory, the court could have overruled the *Batson* objection. Because the basis for the claim of discrimination was apparent even before the close of voir dire, any objection made so long after the jury was empaneled and sworn was untimely.

Finally, Sky Chefs' counsel did not ask the trial judge to do anything. The issue on appeal is contained in the question, "What did the trial judge do that was wrong?" The answer is, "Nothing."

Sky Chefs' counsel stated, first at the beginning of his statement, "*just* for the record" (emphasis added), and again at the end, "that's for the record." At no time did counsel request the court to require Dias to articulate a gender-neutral explanation for the peremptory strikes. In *Edmonson*, the plaintiff asked the trial court to require defendant to supply a race-neutral explanation, and the trial court refused. 111 S. Ct. at 2081. Here, a reading of counsel's statement shows that no request was made and leads to the unmistakable conclusion that the trial judge was not supposed to do anything. Counsel wanted the record to show his contentions, but that is all.

It is too late to claim on appeal that the trial court erred when counsel never asked the judge to do anything. We are not presented with an issue that the court must address *sua sponte*, such as lack of subject matter jurisdiction, *e.g.*, *O'Donnel v. Wien Air Alaska, Inc.*, 551

F.2d 1141, 1145 n.4 (9th Cir. 1977), or defendant's competence in a criminal case, *Chavez v. United States*, 656 F.2d 512, 515 (9th Cir. 1981). No case requires a trial court to address *sua sponte* an issue that neither this court nor the Supreme Court has decided. Trials are still adversary proceedings in which counsel may not lay traps for a trial judge and then expect relief from an appellate court.

The premeptory challenges must be upheld and the jury's verdict affirmed.

CONCLUSION

The jury verdict is AFFIRMED in all respects.

SUPREME COURT OF THE UNITED STATES

No. 90-1153

Sky Chefs, Inc.,

Petitioner,

v.

Connie Dias

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. ___ (1991).

IT IS FURTHER ORDER that the petitioner, Sky Chefs, Inc., recover from Connie Dias Three Hundred Dollars ($300.00) for its costs herein expended.

June 10, 1991

Clerk's costs: $300.00

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONNIE DIAS, *Plaintiff-Appellee,* v. SKY CHEFS, INC., *Defendant-Appellant.*	No. 89-35778 D.C. No. CV-88-367-FR OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge. Presiding

Argued and Submitted
July 13, 1990 – Portland, Oregon

Filed November 27, 1990

Before: Betty B. Fletcher, Warren J. Ferguson and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Torts

Affirming a district court judgment, the court of appeals held that on the facts of this case a jury could

reasonably conclude that a woman employee was wrongfully discharged for resisting sexual harassment of a company's general area manager.

Connie Dias worked in appellant Sky Chef, Inc.'s billing department. The area manager of the facility engaged in ongoing sexual harassment of women employees that included comments on their physical attributes, physical appearance, and the setting of standards of wearing dresses or skirts, nylons and heels specifically so that he could admire women employees' legs. Dias asserted that when she refused to wear nylons and heels, confronted the area manager about the dress standards, and complained to other lower level supervisors about the area manager, the area manager began to complain about Dias' work performance and had her reprimanded several times for trivialities. Dias' location was changed, and she was instructed by the manager not to talk to other women. Dias alleged that this treatment caused her severe emotional distress. She injured herself at work, filed a workers' compensation claim and took a leave of absence. Upon her return to work, the manager informed Dias that her position had been terminated. Dias filed suit in district court, alleging wrongful discharge for protesting the sexual harassment of her coworkers, intentional infliction of emotional distress, and discrimination against her for having applied for workers' compensation benefits. The jury found for Dias on the wrongful discharge and intentional tort claims. The jury awarded Dias $125,000 in general damages, and $500,000 in punitive damages.

At trial a number of witnesses testified supporting the Dias allegations of sexual harassment in the workplace, and of Dias' resistance to it. A jury could well have

concluded that her firing was caused by her actions involving this important public interest. The standards for intent and for socially tolerable conduct depend on the type of relationship that exists between plaintiff and defendant. An employer-employee relationship imposes a greater obligation to refrain from inflicting mental distress than the obligation that exists between strangers. In this case, Dias did not need to show that the employer's actions were intended to cause the specific psychological injury that resulted, so long as she showed that those actions were a tactic designed to stifle opposition to sexual harassment. Dias so argued, and the jury reasonably agreed. In Dias' case, the injury she suffered was distinguishable from ordinary employment abuses because it was carried out in the context of an allegedly sexually abusive work environment intentionally established by Sky Chefs' local general manager. The jury was entitled to consider that context and the intent behind the manager's specific acts in its determination of outrageousness. An employer is liable for the torts of a employee if the employee acts within the scope of employment. Clearly, the specific egregious act will itself rarely be of a kind that the employee was hired to perform. The appropriate inquiry is whether the employee committed the tort while performing, or in connection with, his job responsibilities.

Sky Chefs acknowledged that the local general manager was its highest-ranking corporate manager and its agent for such purposes as general supervision of Dias and others. The jury reasonably could have concluded that the manager viewed Dias' resistance to his sexual harassment as under cutting his approach to furthering

discipline and productivity among women employees. The jury could reasonably conclude that Dias' firing was in furtherance of the manager's administrative responsibilities and within the scope of his employment, despite the fact that his approach was misguided and contrary to public policy. The court noted that given the importance of deterring corporate practices, including hiring decisions, that permit abuse of women who resist sexual harassment on the job, it found nothing in the record to indicate that the amount of punitive damages was outrageous. A jury could reasonably have concluded that the punitive damage award was an appropriate penalty and deterrent. Dias' general damages for intentional torts were not compensable nor preempted by Oregon's Workers' Compensation Act, and Sky Chefs' simple assertions were inadequate to justify overturning the jury verdict. Admitted testimony on discussions of sexual harassment not directly protested by Dias, to which Sky Chefs objected, was relevant both to show Sky Chefs' awareness of and failure to rectify the harassment, and to show the basis for and significance of the protests that Dias did in fact make. On some occasions, the district court permitted Dias' attorney to establish her knowledge of specific incidents of sexual harassment after questions were put to witnesses about harassment, rather than before, by way of foundation. The trial court's decision on this matter, as on the remaining issues objected to by Sky Chefs, was within its discretion. Given the justifiable flexibility of the district court's evidentiary rulings, there was no indication of deliberate disregard of that court's orders to limit testimony about sexual harassment to statements familiar to Dias. Nor was there any evidence

that Dias' attorney intentionally introduced evidence that he knew was improper.

The court rejected Sky Chefs' claim that its fifth amendment right to equal protection was violated by Dias' exercise of peremptory challenges allegedly based on gender. Sky Chefs, a corporation, could not claim to be a member of the constitutionally protected class allegedly excluded from the jury, i.e., males. The court did not reach the question of whether or not males are a constitutionally cognizable suspect class since Sky Chefs was not even a member of that class. The court was not aware of any authority that in an individual case a corporation was entitled to a jury of any particular gender under the equal protection clause. The court noted that nothing in equal protection jurisprudence suggests that corporations should be considered a suspect class meriting heightened judicial review. Sky Chefs did not show the peremptories were irrational or discriminatory against corporations as a class. In addition, Sky Chefs could not meet the established three-part test that would allow it to take on the government's role and assert the rights of the excluded veniremembers. Having found that Sky Chefs had no standing to raise a claim of equal protection on the issue of excluded jury members, its due process claim to an evidentiary hearing examining the motives behind the peremptory strikes also failed.

COUNSEL

Walter V. Siebert and Susan K. Grebeldinger, Sherman & Howard, Denver, Colorado, for the defendant-appellant.

Richard C. Busse, Portland, Oregon, for the plaintiff-appellee.

OPINION

FERGUSON, Circuit Judge:

Sky Chefs, a Delaware corporation, appeals from a jury verdict finding it liable for the actions of its Portland, Oregon general manager, Mr. Tony Nathalia. The jury found that Nathalia sexually harassed woman employees and intentionally inflicted emotional distress upon and ultimately wrongfully discharged a women employee, Ms. Connie Dias, for resisting that sexual harassment. We affirm.

I.

Sky Chefs, Inc. is a Delaware corporation headquartered in Dallas, Texas. It maintains a number of regional facilities in the United States, each of which is directed locally by a General Manager. In Portland, the General Manager is responsible for "general supervision" of approximately 230 employees. The company supplies meals to airlines.

Dias began work at the Portland, Oregon facility in April 1985 as a clerical worker in the billing department. In September 1986 she was promoted while working under General Manager Jim Durham. Later that month,

Nathalia replaced Durham as the Portland General Manager. Nathalia had been transferred by the company from its San Diego facility, where he had also served as General Manager.

According to Dias and other witnesses at trial, Nathalia upon arrival engaged in ongoing sexual harassment of women employees. The harassment included daily comments on the breasts, buttocks, and physical appearance of individual women; suggestions to women that they show Nathalia "a good time" and treat him as well as the women employees in the San Diego facility had treated him; staff meetings at which he established job standards for women employees that included the wearing of dresses or skirts, nylons and heels specifically so that he could admire women employees' legs. Nathalia denied these allegations at trial.

Dias asserted that she refused to wear nylons and heels and confronted Nathalia about the dress standards; that she complained to lower-lever supervisors about Nathalia; that she acted as a spokesperson for other women employees in complaining to local supervision about the sexual harassment. She alleged that particularly after complaining to Office Manager Tom Illk, Nathalia began to make numerous remarks to Dias complaining about her personal appearance and criticizing her work performance. She alleged that Nathalia changed her work location, instructed her not to talk with women in other departments, "overscrutinized and sabotaged her work; directed supervisors to discipline for her trivialities; interfered with her receipt of benefits; [and] had her followed." Dias alleged that this treatment caused her severe emotional distress. In June 1987 she fell at work,

injuring herself. She filed a workers' compensation claim and took a leave of absence. Her physician released her for a limited duty return to work as of December 7, 1987, with a recommendation that she gradually increase her hours to full-time work. However, upon her return to the office on December 7, Dias alleged that her supervisor informed her that her position had been eliminated, that the company had no work for her, and per General Manager Nathalia's recommendation, Dias was terminated.

Following her termination, Dias filed suit in federal district court, which had diversity jurisdiction under 28 U.S.C. § 1332. She alleged three claims: wrongful discharge for protesting the sexual harassment of her coworkers; intentional infliction of severe emotional distress; and discrimination against her for having applied for workers' compensation benefits. The jury found for Sky Chefs on the workers' compensation claim, but found for Dias on the wrongful discharge and intentional tort claims. The jury awarded Dias $125,000 in general damages and $500,000 in punitive damages.

Sky Chefs filed a post-trial motion for judgment notwithstanding the verdict, which was denied. It now appeals, asserting the following:

(1) The evidence could not, as a matter of law, support a finding of liability for wrongful discharge or intentional infliction of emotional distress;

(2) Punitive damages could not be awarded in this case as a matter of law; and the general damages were excessive;

(3) Sky Chefs is entitled to a new trial, because of misconduct by Dias' attorney and because of various mistakes by the trial court;

(4) Sky Chefs was denied a fair trial because the only three men in the jury venire were struck by peremptory challenge, leaving an all-woman jury.

We address the claims sequentially.

II.

We will reverse a jury finding of liability only if "without weighing the credibility of the witnesses, the evidence and its inferences, considered as a whole and viewed in light most favorable to the [prevailing] party . . . can support only one reasonable conclusion. . . . " *Davison v. Pacific Inland Nav. Co., Inc.*, 569 F.2d 507, 509 (9th Cir. 1978); *see also Walker v. KFC Corp.*, 728 F.2d 1215, 1223 (9th Cir. 1984). Since this is a diversity action, we apply the law of Oregon to the claims of wrongful discharge and intentional infliction of emotional distress. *County of Maricopa of State Ariz. v. Maberry*, 555 F.2d 207, 210 (9th Cir. 1977).

A. *Wrongful Discharge.*

Under Oregon Law,

> [T]he common law rule for "at well" employment prevails unless the employe is discharged while pursuing a right related to his or her role as an employe and the right is one of important public interest indicated by constitutional and statutory provisions and caselaw. . . . We have

> stated that sexual harassment on the job is a forbidden discriminatory act under state and federal law and an employe has a legal right which is of important public interest not to be discharged for resisting sexual harassment on the job.

Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1300 (Or. 1984).

Dias alleged that she was discharged principally for "resisting sexual harassment on the job." At trial a number of witnesses testified supporting the allegations of sexual harassment and of Dias' resistance to it. A jury could have concluded that her firing was caused by her actions involving this "important public interest."

B. *Intentional Infliction of Emotional Distress.*

Under Oregon law the general requirements for this tort action are as follows:

> To succeed on a claim for the intentional infliction of severe emotional distress plaintiff must show that (1) defendant intended to inflict severe emotional distress on plaintiff; (2) defendant's acts did in fact cause plaintiff to suffer severe emotional distress; (3) defendant's acts consisted of "some extraordinary transgression of the bounds of socially tolerable conduct."

Lewis v. Oregon Beauty Supply Co., 733 P.2d 430, 436 (Or. 1987).

The standards for intent and for socially tolerable conduct depend on the type of relationship which exists between plaintiff and defendant. "[A]n employer-

employee relationship . . . imposes a greater obligation to refrain from inflicting mental distress than the obligation which exists between strangers." *Trout v. Umatilla Co. School District*, 712 P.2d 814, 818-819 (Or. App. 1985).

The Oregon Supreme Court has held that "the duty to refrain from abusive behavior in the employment relationship comes closer to that of the physician toward a patient . . . than to that of . . . police officers toward a citizen not in custody and free to terminate the encounter. . . . " *Hall v. May Dept. Stores Co.*, 637 P.2d 126, 131 (Or. 1981).

As to intent, the key inquiry is "whether the jury could find that [the company agent] attempted to threaten and frighten plaintiff as a deliberate tactic even though he knew that he did not have convincing evidence of misconduct on her part." *Id.* at 131, *see also id.* at 134 n. 4. In this case Dias need not show that the employer's actions were intended to cause the specific psychological injury which resulted, so long as plaintiff showed that those actions were a tactic designed to stifle opposition to sexual harassment. The plaintiff so argued and a jury could reasonably have agreed.

As to the standard of "outrageousness" in the employment context, "the key focus . . . is not on the result, but on the purpose and the means used to achieve it." *Patton v. J.C. Penney Co.*, 719 P.2d 854, 858 (Or. 1986). The defendant's behavior must be distinguishable from "the insults, ill temper, and offensive jokes that persons are expected to endure under contemporary standards of behavior." *Id.* (quoting *Brewer v. Erwin*, 600 P.2d 398, 411 (Or. 1979)).

In cases such as *Patton*, 719 P.2d at 858, and *Snyder v. Sunshire Dairy*, 742 P.2d 57, 58 (Or. App. 1987), the Oregon courts have held that "rude" or "tyrannical" behavior by supervisors, or excessive supervision and unjustified reprimands, *when occurring in the context of discharges not invoking any significant public interest*, could not in themselves give rise to an intentional tort claim. At the same time, the outrageousness of the conduct is measured not merely by the severity of the acts themselves but also by the context in which the acts are committed. For example, in *Turman v. Central Billing Bur., Inc.*, 568 P.2d 1382, 1385 (Or. 1977) a case involving abuse of a debtor by a bill-collector, the outrageousness of the bill-collector's acts was judged not only by the collector's external acts – abusive language over the phone – but also by the contextual facts that the collector knew the debtor had made some payment on the bill, and that the debtor was impoverished and blind. *Id.*

In Dias' case, the injury she suffered is distinguishable from ordinary employment abuses because it was carried out in the context of an allegedly sexually abusive work environment intentionally established by Sky Chefs' local general manager. The jury was entitled to consider that context and the intent behind the manager's specific acts in its determination of outrageousness. *See Hall*, 637 P.2d at 133 n.3 ("permissible" acts may become impermissible if done with illicit intent and knowledge of predictable illicit result).

C. *Respondeat Superior.*

Defendant claims that the company should not be held liable for Nathalia's acts, because any sexual harassment committed was Nathalia's sole responsibility.

An employer is liable for the torts of an employee if the employee acts within the scope of employment. *Stanfield v. Laccoarce*, 588 P.2d 1271 (1978). Generally, whether an employee acts within the scope of employment depends on three factors:

> (1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform.

Chesterman v. Barmon, 753 P.2d 404, 406 (Or. 1988) (citing *Stanfield v. Laccoarce*, 588 P.2d 1271 (1978) and *Gossett v. Simonson*, 411 P.2d 277 (1966)).

Clearly the specific egregious act giving rise to an intentional tort claim will itself rarely be "of a kind which the employee was hired to perform;" the appropriate inquiry is whether the employee committed the tort while performing, or in connection with, his job responsibilities. *See, e.g.*, Holtzman and Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims after Raritor Savings Bank v. Vinson*, 31 St. Louis U.L.J. 239, 276 (1987) ("Sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business." The Oregon Supreme Court has discussed this issue in the following way:

> In *Fields. v. Lancaster Cotton Mills*, 77 S.C. 546, 58 S.E. 608 (1907), a corporation was held liable when the superintendent of a cotton mill directed and participated in the assault of one who sought to lure cotton mill employees to

> other jobs. The court held that Lancaster Cotton Mills was liable for the acts of the superintendent because he was entrusted with the control of its policies and the methods to be employed to prevent interference with its employees . . .
>
> . . .
>
> [T]he corporation is liable for the acts of one entrusted with the control of the company policy if the act was in the execution of a corporate function. . . . Newer cases reflect the concept that by giving one powers of management, the corporation "must be held to have invested him with authority to make decisions for it, when necessary, in connection with the performance of those duties. When made, the [employee's] judgment becomes the judgment of the defendant."

Chesterfield, 753 P.2d at 408 (Peterson, C.J., concurring) (citations omitted).

In the present case, Sky Chefs acknowledges that in his capacity as General Manager, the highest-ranking corporate officer in Portland, "Nathalia was its agent for such purposes as general supervision of Dias and others." Sky Chefs further asserts that "Nathalia's motivation with respect to Dias was to obtain improved work performance." The jury reasonably could have concluded that Nathalia viewed Dias' resistance to sexual harassment as undercutting his approach to furthering discipline and productivity among women employees. The jury reasonably could have concluded that Nathalia's treatment of Dias, including her discharge, was thus in furtherance of his administrative responsibilities and within the scope of

his employment, despite the fact that his approach was misguided and contrary to public policy.

III.

Sky Chefs seeks review of the damage awards. "The jury's verdict should be accepted if it could reasonably have been reached" and a trial court's decision against remittitur is reversed only on a showing of "clear abuse of discretion." *Raynor Bros. v. American Cyanimid Co.*, 695 F.2d 382, 385 (9th Cir. 1982).

A. *Punitive Damages.*

"The rationale for allowing punitive damages is to punish the offender and to deter others from similar conduct." *Honeywell v. Sterling Furniture Co.*, 781 P.2d 379, 380-381 (Or. App. 1989).

Sky Chefs argues that the conduct alleged was not sufficiently aggravated to justify punitive damages as a matter of law. But as the Oregon Supreme Court has stated,

> [I]t seems clear that in a jurisdiction which generally allows punitive damages for grave intentional torts, punitive damages in principle are allowable when an "extraordinary" or "extreme" transgression of social norms is an indispensable element of the tort itself. When the jury is correctly instructed on that element of liability as well as on compensatory and punitive damages, and there is evidence to support its verdict as to liability, this tort leaves little room to scrutinize the facts for an additional degree of aggravation to support punitive damages.

Hall, 637 P.2d at 134-135.

Sky Chefs does not allege that the jury was improperly instructed either on the standard of liability or on the standard for awarding punitive damages. Further, Oregon law has long held that punitive damages may be awarded when a company agent is "employed in a managerial capacity and [is] acting in the scope of employment." *Stroud v. Denny's Restaurant, Inc.*, 532 P.2d 790, 791 (1975); *see also* Hodel, *The Doctrine of Exemplary Damages in Oregon*, 44 Or.L.Rev. 175, 233 (1965). Given the importance of deterring corporate practices, including hiring decisions, which permit abuse of women who resist sexual harassment on the job, we find nothing in this record to indicate that "the amount of the verdict is 'outrageous,' 'shocking' or 'monstrous'." *Oliver v. Burlington Northern, Inc.*, 531 P.2d 272, 274 (Or. 1975). A jury could reasonably have concluded that the punitive damage award was an appropriate penalty and deterrent.

B. *General Damages.*

Sky Chefs alleges that Dias' damages are compensable and preempted by the Oregon Workers' Compensation Act. Damages for intentional torts are not preempted. *Palmer v. Bi-Mart Co.*, 758 P.2d 888, 891 (Or. App. 1988).

Sky Chefs asserts that Dias' calculation of her noneconomic damages, including treatment by a psychiatrist, was "not credible." Dias alleged that she was caused severe emotional distress on the job during Nathalia's tenure. She alleged that she had never been discharged

before, that after discharge she became depressed, suffered eating and sleeping disorders, and has had psychological difficulty returning to the workforce, resulting in her receiving welfare assistance for the first time in her life. She has had ongoing and regular treatment by a psychologist, and has incurred all medical bills since her discharge without medical insurance. In light of these allegations and our deference to the jury's decision, we find Sky Chefs' simple assertions inadequate to justify overturning the jury verdict.

IV.

Sky Chefs also seeks a new trial, alleging reversible errors by the trial court and misconduct by plaintiff's attorney. Trial court rulings on evidentiary matters, and on whether there has been attorney misconduct, are reviewed for abuse of discretion. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *County of Maricopa of State of Ariz. v. Maberry*, 555 F.2d 207, 219 (9th Cir. 1977).

A. *Evidentiary rulings.*

First, Sky Chefs asserts that all testimony regarding sexual harassment which Dias did not specifically protest should have been excluded. Sky Chefs cites to *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984), which is inapposite. *Haskell* was an Age Discrimination in Employment Act (ADEA) case, not an intentional tort case, in which testimony by plaintiff's co-workers on age discrimination was submitted in an improper attempt to show a "pattern and practice" of age discrimination. *Id.* at 121-122. The

standards of relevance in Dias' case are entirely different. Admitted testimony on discussions of sexual harassment not directly protested by Dias, to which Sky Chefs objects, was relevant both to show Sky Chefs' awareness of and failure to rectify the harassment, and to show the basis for and significance of the protests which Dias did in fact make.

Secondly, Sky Chefs asserts that Dias' attorney asked questions about incidents of sexual harassment without first establishing that Dias had knowledge of those incidents. Sky Chefs asserts that this was in violation of the court's order to "exclude the testimony by Dias of incidents of sexual discrimination not witnessed by her or not related to her while she was on the job because it's the job environment that is at issue here."

The trial court ruling at issue was directed at Dias' personal testimony. With regard to the testimony of others, and the court's attempts to limit testimony about sexual harassment to statements familiar to Dias, the court stated, "I'll try to carve out a rule and then within that rule there may be other objections at the time and I'll have to rule on those . . . and then within that broad ruling you'll have to make other objections." On some occasions, the trial court permitted plaintiff's attorney to establish Dias' knowledge of specific incidents of sexual harassment *after* questions were put to witnesses about harassment, rather than *before*, by way of foundation. The trial court's decision on this matter, as on the remaining issues objected to by Sky Chefs, was within its discretion.

B. *Attorney Misconduct.*

Sky Chefs also alleges that Dias' counsel repeatedly asked objectionable questions beyond the limits of the court's orders described above, and that this constituted attorney misconduct. However, given the justifiable flexibility of the court's rulings, there is no indication of deliberate disregard of the court's orders. Nor is there any showing that Dias' attorney intentionally introduced evidence which he knew was improper. *Cf. Maberry*, 555 F.2d at 217-218. Therefore, these claims also must fail.

V.

Finally, Sky Chefs asserts that its Fifth Amendment rights were violated by the plaintiff's use of peremptory challenges to strike three males from the jury venire, leaving an all-woman jury, relying on *Batson v. Kentucky*, 476 U.S. 79 (1986). We review this issue of law *de novo*, *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied* 469 U.S. 824 (1984). We pay it particular attention since this court has recently extended the *Batson* equal protection right to gender-based peremptory challenges in criminal cases. *United States v. De Gross*, No. 87-5226, slip op. at 10903 (9th Cir. Sept. 10, 1990).[1]

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[1] *De Gross* was decided on September 10, 1990, after briefing in *Dias* had already been completed. However, Sky Chefs may be entitled to the benefit of the rule announced in *De Gross* under the familiar principle that a judicial decision affecting federal civil law applies retroactively, unless it would produce "inequitable results." *Reed v. Hoy*, 909 F.2d 324, 327 (9th Cir. 1989); *Chevron Oil v. Huson*, 404 U.S. 97, 106-08 (1971) (discussing factors to consider in determining whether a decision

(Continued on following page)

For fifteen years, it has been clear that the systematic exclusion of women from jury *venires* is a form of gender discrimination which violates the "fair cross-section" guarantee of the Sixth Amendment in criminal cases. *Taylor v. Louisiana*, 419 U.S. 522 (1975). This holding was reaffirmed by the Supreme Court just last term, in *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990): the Sixth Amendment "entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs." *Id.*, 110 S.Ct. at 805 (citing *Taylor*). Of course, Sky Chefs has not and cannot claim this privilege under the Sixth Amendment, since defendants in *Civil proceedings*, whether black, white, male, female, or corporate, do not enjoy Sixth Amendment rights.

However, since 1986, black criminal defendants have also enjoyed the right to object to purposeful discrimination through the use of peremptory challenges against members of their own race, under the equal protection

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should apply only prospectively). For the purposes of this case, we assume without deciding that *De Gross* applies retroactively.

In extending the *Batson* equal protection right to gender-based challenges, *De Gross* broke new ground by also allowing a prosecutor to object to a defendant's peremptories. *De Gross* at 10904. However, the panel was careful to point out that the U.S. Attorney had standing to assert this right only on behalf of the *excluded juror*, not the government. Therefore, *De Gross* itself affords no new rights to civil defendants or plaintiffs, such as Sky Chefs or Dias. *Id.* at 10898 & n.5.

clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986). This right is based on ethnic group membership rather than status as a criminal defendant; however, it has never been extended to civil cases, to corporate defendants, or to cross-racial peremptory challenges in this circuit.[2]

Like Batson, Sky Chefs claims that its Fifth Amendment right to equal protection was violated by the plaintiff's exercise of peremptory challenges allegedly based on gender. *See United States v. De Gross*, No. 87-5226, slip op. at 10903 (9th Cir. Sept. 10, 1990). But the confines of this equal protection right are narrow. To assert such a claim the petitioner must either be a member of the

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[2] *See, e.g. United States v. Vaccaro*, 816 F.2d 443 (9th Cir. 1987), *cert. denied* 484 U.S. 914. It should be noted that the Supreme Court has recently emphasized the distinction between *Taylor's* Sixth Amendment-based "fair cross-section" right, which guarantees a representative jury venire regardless of the defendant's race or sex, and the *Batson* equal protection right, which covers race-based peremptory challenges, and ensures only that members of a defendant's *own race* may not be discriminatorily excluded from her jury. As Justice Scalia commented, "[t]he Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)." *Holland* at 807.

In *Holland* itself, however, several Justices expressed their readiness to extend *Batson* to peremptory challenges which operate on racial lines, regardless of the defendant's race. *See Holland*, 110 S.Ct. at 811 (Kennedy, J., concurring), 813 (Marshall, J., dissenting), & 821 (Stevens J., dissenting). Should such an extension occur, however, there is no reason to assume that it would apply to corporate defendants, to gender-based claims, or to civil cases.

constitutionally protected class being excluded, *Batson* at 86, or must be asserting the rights of the excluded jury members, rather than his or her own rights, *De Gross* at 10898.

Petitioner, a corporation, cannot claim to be a member of the constitutionally protected class allegedly excluded from the jury, i.e., males.[3] We need not reach the question of whether or not males are a constitutionally cognizable "suspect class" since defendant is not even a member of that class. Although the Court has yet to rule on "whether a defendant's race affects his standing to invoke *Batson*", *Holland* at 814 (Marshall, J., dissenting), we are aware of no authority that in an individual case a corporation (or even a male defendant) is entitled, under the equal protection clause, to a jury of any particular gender. *Cf. Apodaca v. Oregon*, 406 U.S. 404, 413 (1971).

Even if *Batson* were to be extended to allow black defendants to challenge peremptory strikes of white venirepersons or vice versa, *see Holland* at 811-812 (Kennedy, J., concurring), 813-814 (Marshall, J., dissenting), 821-822 (Stevens, J., dissenting), it does not logically following that corporations would be allowed the same latitude. Nothing in equal protection jurisprudence suggests that corporations should be considered a suspect class meriting heightened judicial review. *See, e.g., Railway Express Agency v. New York*, 336 U.S. 106 (1949). Sky Chefs has made no attempt to show that the peremptories

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[3] The transcript indicates that three men and five women were struck from the jury by peremptory challenges, but not which side struck which juror. Record at 40-41.

were irrational or discriminatory against corporations as a class.

Peremptory challenges are an important aspect of the trial process, as *Holland* emphasizes:

> The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone. . . . Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides,' thereby 'assuring the selection of a qualified and unbiased jury.'

Id. at 808-809 (citations omitted). Such goals clearly supply a rational basis for the tradition of allowing peremptory challenges in civil jury trials. Since the corporation cannot claim that members of its own "race" were discriminatorily excluded, Dias' peremptory challenges did not violate Sky Chef's equal protection rights under *Batson*.

However, this does not end the inquiry. We must also examine whether petitioner has standing under *De Gross* to assert the equal protection rights of the excluded jurors themselves. *See De Gross* at 10898. Ms. De Gross appealed her conviction on criminal charges of transporting aliens, claiming that the district court erred in denying her peremptory challenge of a male venireperson.[4] The

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[4] De Gross had struck seven men from the venire and the government objected at the eighth. When finally empaneled, the jury consisted of three men and nine women. *De Gross* at 10897.

government's objection to the peremptory was sustained, and we affirmed the trial court's decision, after concluding that the government did have standing to make the objection, based not on its own rights but on the rights of the excluded juror and on the government's unique position as guardian and defender of the jury system.[5] Three factors were considered by the *De Gross* court in granting third-party standing to the U.S. Attorney on behalf of the excluded jurors: (1) the government has a sufficient relationship to the venireperson to ensure vigorous defense of their rights, (2) excluded venirepersons are effectively deterred from asserting their own rights, and (3) the United States as a whole suffers an injury when the venireperson's rights are violated in a criminal case, since the entire jury system is impugned and the government's interest in fair trials is injured. *Id.* at 10899-900.

Third-party standing is generally disfavored by the courts, on both constitutional and prudential grounds. *See, e.g., Valley Forge College v. Americans United,* 454 U.S. 464, 474 (1982). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or

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[5] The court also found that state action was present, based on the trial judge's ultimate authority over the entire process: "the defendant's action in striking venirepersons is fairly attributable to the state." *Id.* at 10906. *Accord, Fludd v. Dykes,* 863 F.2d 822 (11th Cir. 1989), (*Batson* claim available in race-based civil rights action); *cert. denied sub nom. Tiller v. Fludd,* ___ U.S. ___, 107 L.Ed.2d 154 (1989). *Cf. Edmonson v. Leesville Concrete Co.,* 895 F.2d 218 (5th Cir. 1990) (en banc) (*Batson* not applicable to civil rights cases because peremptories not "state action"), *cert. granted* 50 U.S.L.W. 3243 (U.S. October 1, 1990).

threatened injury as a result of the putatively illegal conduct of the defendant,' " and that the injury is redressable by the courts. *Id.* at 472. Furthermore, "prudential principles" also mitigate against allowing third-party standing: "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties." *Id.* at 474.

As in *De Gross*, the corporation here seeks to extend *Batson* to a gender-based peremptory challenge. However, as we have seen, Sky Chefs has no *Batson* rights of its own. Furthermore, Sky Chefs cannot meet the three-part test established in *De Gross*, which would allow it to take on the government's role and assert the rights of the excluded veniremembers, as did the U.S. Attorney in that case. The second requirement of the three elements is met, since clearly the excluded venirepersons in this case can no more protect their own rights than could the excluded jurors in *De Gross*.

However, Sky Chefs cannot satisfy either the first or the third element. It has no relationship with the venirepersons whatever except to obtain what it perceives to be a panel more favorable to its position. It has no interest in the rights of the venirepersons beyond its own self-interest. Its position is different from that of the government, which has a duty to protect the individual rights of each venireperson. Similarly, the third standing requirement is not met in this case, since Sky Chefs does not suffer any redressable injury when a venireperson's rights are violated. Unlike the U.S. government, a civil defendant has no inherent duty to safeguard the integrity of the judicial process and ensure that "[s]election procedures that purposefully exclude . . . persons from juries

[do not] undermine public confidence in the fairness of our system of justice." *Holland* at 821 (Stevens, J., dissenting) (quoting *Batson* at 87). Thus, we hold that petitioner lacks standing to sue on behalf of the male jurors who were allegedly excluded due to their gender.

Having found that petitioner has no standing to raise a claim under either *Batson* or *De Gross*, petitioner's due process claim to an evidentiary hearing examining the motives behind the peremptory strikes must also fail.[6]

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[6] The timeliness of Sky Chefs' objection was also problematic, since it was not raised until after the jury had been empaneled and the remaining venirepersons excused. *See U.S. v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987) (*Batson* objections must occur as soon as possible, preferably before jury is empaneled).

Here, the objection was raised only after the jury had been sworn, the court had recessed and reconvened, defendant's motions in limine had been presented and argued, and defendant had noted several other objections. Sky Chefs did not ask the judge to conduct a *Batson* hearing on the issue of discriminatory intent, but merely stated "for the record" that "[w]e think there has been a systematic exclusion of males from the jury and that is evidenced by the list-that went back and forth . . . " Transcript at 57.

Unlike *Thompson*, this objection could have been raised much earlier, and the plaintiff here was prejudiced by its tardiness. The objection could have been raised when petitioner's lawyer first saw the list of challenged jurors, when the challenged jurors were asked to move to the back of the room, immediately after the jury was sworn in, or when the judge recessed the court. Had the objection been contemporaneous with the voir dire, the court could have requested an explanation from the plaintiff and denied the challenge if no neutral explanation was presented, as he did in *De Gross*. Where, as

(Continued on following page)

Since, as a corporate defendant in a civil case, petitioner cannot claim any "fair cross-section" right under *Taylor* or *Holland*, it lacks sufficient racial identity to assert a *Batson* claim, and also lacks standing to assert the rights of the three male venirepersons under *De Gross*, the peremptory challenges must be upheld and the jury's verdict affirmed.

AFFIRMED.

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here, the claimed discrimination is apparent before the close of voir dire, an objection made after jury empanelment is arguably untimely.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CONNIE DIAS, Plaintiff, v. SKY CHEFS, INC., a Delaware corporation, Defendant.	)	NO. CV88-367FR JUDGMENT (Filed June 23, 1989)

THE MATTER came on regularly for trial on the 13th day of June, 1989. Plaintiff appeared by Richard C. Busse of her attorneys and Defendant appeared by Walter V. Siebert and Richard L. Sadler of its attorneys. Thereafter opening statements were heard, testimony and other evidence were introduced by the parties, who thereafter rested.

On or about the 16th day of June, 1989, after arguments of counsel and after having been instructed on all matters of law the jury returned its special verdict as follows:

> "We, the jury, do hereby render our unanimous verdict as follows:
>
> "1. Was Tony Nathalia acting as Sky Chefs' agent with respect to Connie Dias' claims?
>
> "Yes x
>
> "No ____
>
> "If your answer is 'no,' your verdict is for Sky Chefs. The presiding juror will date and sign this verdict form and signal the clerk.

"If your answer is 'yes,' please proceed to questions 2, 3 and 4.

"2. Did Tony Nathalia intentionally cause Connie Dias to suffer extreme emotional distress?

"Yes _____

"No _____

"Proceed to question 3.

"3. Did Tony Nathalia wrongfully discharge Connie Dias in retaliation for her protesting the sexual harassment of others?

"Yes x

"No _____

"Proceed to question 4.

"4. Did Tony Nathalia discriminate against Connie Dias because she filed a workers' compensation claim?

"Yes _____

"No x

"If your answer is 'no' to questions 2, 3 and 4, your verdict is for Sky Chefs. The presiding juror will date and sign this verdict form and signal the clerk.

"If your answer is 'yes' to either question 2 or 3, please proceed to question 5.

"5. What are Connie Dias' damages, if any, for her claims for emotional distress and wrongful discharge?

"General Damages $ 125,000.00

"Punitive Damages $ 500,000.00

"If your answer is 'yes' to question 4, please proceed to question 6.

"6. What are Connie Dias' damages, if any, for her claim that she was discriminated against because she filed a workers' compensation claim.

"General Damages $ _____

"DATED this *16th* day of June, 1989.

"/s/ Judy Robbins
Presiding Juror"

BASED UPON the foregoing special verdict, it is hereby

ORDERED and ADJUDGED that Plaintiff recover from and have judgment against Defendant in the sum of $125,000.00 general damages, $500,000 punitive damages, plus her costs and disbursements incurred herein.

DATED this 23 day of June, 1989.

/s/ Helen J. Frye
THE HONORABLE
HELEN J. FRYE
United States
District Judge

Presented By:

/s/ Richard C. Busse
RICHARD C. BUSSE
Of Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Judgment on the following:

Richard L. Sadler, Esq.
Copeland, Landye, Bennett
and Wolf
3500 First Interstate Tower
Portland, Oregon 97201

Walter V. Siebert, Esq.
Sherman and Howard
3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202

Of Attorneys for Defendant

on June 20, 1989 by mailing to said attorneys a copy each thereof, contained in a sealed envelope, with postage prepaid, addressed to said attorneys at their last known addresses as stated above, and deposited in the United States Post Office at Portland, Oregon on said day.

DATED this 20 day of June, 1989.

/s/ Richard C. Busse
RICHARD C. BUSSE
Of Attorneys for Plaintiff